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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 951

FRANK SCHWARZ, PER SE AND AS AGENT AND FOR THE USE AND BENEFIT OF WM. KOTEK AND WM. MEROSHEK,
Petitioner,

vs.

WITWER GROCER COMPANY, A CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

RESPONDENT'S BRIEF.

STEWART HOLMES,
Counsel for Respondent.

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Petitioner,

vs.

WITWER GROCER COMPANY, a Corporation,
Respondent.

RESPONDENT'S BRIEF.

Respondent prays that the Petition for Writ of Certiorari be denied.

Statement.

Respondent submits that the Statement of Petitioner does not conform to the Findings of Fact. The cause was tried to the Court without a jury. The trial court made Findings of Fact, which the United States Circuit Court of Appeals held were amply supported by the evidence, stating (R. pages 40-41):

"The facts found were these: (1) Defendant is engaged in the wholesale grocery business with its principal plant at Cedar Rapids, Iowa; (2) The defendant handles some

commodities shipped into its warehouse at Cedar Rapids from states other than Iowa; (3) The greater part of defendant's business was selling and distributing goods from its warehouse in Cedar Rapids to Iowa retailers; they were in part loaded by defendant on trucks at the warehouse and so transported by the defendant to retailers in Iowa and in part loaded by defendant on the trucks of customers to be carried away by them; (4) Defendant's employees were assigned to 'gangs'—(a) 'the city gang' which loaded goods from defendant's warehouse for distribution locally to retailers, (b) 'the call gang,' which loaded goods from defendant's warehouse on the trucks of Iowa customers, and (c) 'the unloading gang,' which unloaded interstate shipments from railway cars; (5) The workmen seeking recovery in this proceeding were primarily employed in the 'city gang' and 'the call gang' but 'occasionally,' when they were not busy 'in their own line of work' they assisted 'the unloading gang,' but when they did that or how much time they gave to that work does not appear. The Findings of Fact made by the district court unless clearly erroneous, will be taken by this court as the facts. A review of the record convinces us that the findings were supported amply by the evidence."

Reasons for Denying the Writ.

Respondent urges that, the decision of the United States Circuit Court of Appeals reported in 141 F. 2nd 341 follows the decisions of this Court; is not in conflict with a decision of another Circuit Court of Appeals; no purpose would be served for this Court to assume jurisdiction of this cause, and therefore the Petition should be denied.

I.

Respondent submits that the Petitioner in framing his first question does not accurately state an issue arising

from this cause. His inquiry does not disclose, as appears in the Findings of Fact, that Petitioner and his principals were primarily engaged as "loaders" loading for local delivery, merchandise that had come to rest in the warehouse and that only occasionally they, in segregated activities assisted "unloaders" in Interstate Commerce. Petitioner bases his whole brief upon his incomplete inquiry. The question should be:

(1) Whether the Petitioner has the burden of proving that he and his principals were substantially engaged in Interstate Commerce, and failed to sustain that burden, when the Findings of Fact, found by the United States Circuit Court of Appeals to be amply supported by the record, were that the Petitioner and his principals were primarily engaged as "loaders" in Intrastate Commerce and only occasionally or incidently, for indefinite periods and at indefinite times in segregated activities assisted "unloaders" in Interstate Commerce.

The Findings of Fact (R. pages 40-41) (Respondent's Statement) discloses that: the Petitioner and his principals were primarily engaged as "loaders" loading for local delivery merchandise that had come to rest in the warehouse; there was no evidence that any of such merchandise was received on special order or received pursuant to previous contracts or any facts which indicated a practical continuity of movement of goods; only *occasionally* or incidentally for indefinite times and for indefinite periods they assisted the "unloading gang" in unloading Interstate merchandise, but that was not their regular duties.

The Act itself (Sections 6 and 7 of the Fair Labor Standards Act, 29 U. S. C. A. Sec. 206, 207) states and this Court held, in *Kirschbaum* v. *Walling* 316 U. S. 517, *Warren-Bradshaw Drilling Co.* v. *Hall* 317 U. S. 88, *Walling* v. *Jacksonville Paper Company* 317 U. S. 564 that it applies only

to those employees that are engaged in Interstate Commerce or in the production of goods for Interstate Commerce. It is immaterial whether the employer may or may not be in Interstate Commerce in some of its other activities through other employees.

In *Walling* v. *Jacksonville Paper Company, supra*, the Court states that the Act applies only "if a substantial part of an employee's activities related to goods whose movement in the channels of Interstate Commerce was established by the test we have described" and then held that a wholesaler's employees loading, for local delivery, merchandise that had come to rest in the warehouse, and not received as special orders or pursuant to a previous contract, or had a practical continuity of movement were not engaged in Interstate Commerce.

The Court in *Warren-Bradshaw Drilling Co.* v. *Hall supra* held that the burden was on the employee to prove that he was substantially engaged in Interstate Commerce.

Petitioner cites the case of *Guess* v. *Montague* 140 Fed. 2nd. 500 as a decision of another Circuit Court of Appeals in conflict with the case at bar and for that reason asks this Court to assume jurisdiction of this cause. They can be distinguished. In the *Guess* case the employer was engaged in rehabilitating machinery, some of which was sold outside the State. The Plaintiff, a mechanic, was employed in the production of goods. The record showed some, but not how much of the merchandise was sold out of the State. The Court held that was peculiarly in the knowledge of the employer and distinguishes those facts from those here, where the Interstate and the Intrastate duties were segregated. In the case at bar Petitioner and his principals were employed primarily in the "loading gang" in Intrastate Commerce, only occasionally assisting the "loading gang"

in Interstate Commerce. These were segregated activities. Whether the Petitioner and his principals were substantially engaged in Interstate Commerce was as much or more in their knowledge as in that of the employer.

In the case at bar there was no evidence whether the Petitioner and his principals performed Interstate duties one minute a day or one hour a week. As there was nothing in the record indicating even approximately how much of their time was so spent, there was no evidence from which a Court could find that such employment was substantial. To conclude anything is substantial it must appear approximately how much it is. As the Findings of Fact state that the Petitioner's and his principals' Interstate services were only *occasional* or incidental, he did not sustain the burden of proving that such services were substantial. Rather, he proved it was not substantial.

II.

Petitioner in his second question presents an issue which was not before the Court. Neither the United States District Court or United States Circuit Court of Appeals discussed whether an employee engaged both in Intrastate and Interstate Commerce was entitled to the provisions of the Act for only those hours he was engaged in Interstate Commerce. The only reason for mentioning how much time was so spent was to ascertain whether there was anything in the record to indicate it was substantial.

It is therefore earnestly urged that the decision of the United States Circuit Court of Appeals, that the burden was upon the Petitioner to prove that he and his principals were substantially engaged in Interstate Commerce; and

that from the Finding of Facts he had failed to sustain that burden is consistent with the decisions of this Court and does not present adequate questions for the issuance of the Writ, and therefore the Petition should be denied.

Respectfully submitted,

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